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Supreme Court, U.S.
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No. 97-572

In The

Supreme Court of the United States

October Term, 1997

THOMAS CYR and KEVIN CAPPER,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that Petitioners presented no genuine issue of material fact whether police officers acted in an objectively reasonable manner in using force during the arrest of Petitioners, and were thus entitled to qualified immunity?

2. Did the United States Court of Appeals for the Fifth Circuit correctly determine that Petitioners presented no genuine issue of material fact whether the individual respondents were entitled to qualified immunity as a matter of law?

3. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that Petitioners presented no genuine issue of material fact whether police officers violated Petitioners' Fourth Amendment rights?

4. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in determining that Petitioners presented no issue of municipal liability?

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents City of Dallas, Dallas Police Department, Jackson, Tolliver, Garcia, Parker, Maines and Kowalski file this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking the Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued April 3, 1997, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents respectfully show the Court as follows:

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Petitioners' statement regarding the course of proceedings and disposition in the trial court is essentially correct. For the sake of accuracy and completeness, however, Respondents provide the following statement of the course of proceedings in this case.

Petitioners Thomas Cyr and Kevin Capper filed this action in the 95th Judicial District Court of Dallas, County, Texas, on February 25, 1994. Respondents were served with service of process and answered. Petitioners' Original Petition did not assert any federal causes of action; however, Petitioners' First Amended Original Petition (hereafter "Petitioners' Amended Petition"), filed April 7, 1995, asserted, for the first time, a cause of action

under 42 U.S.C. § 1983. Respondents timely removed this action to the United States District Court for the Northern District of Texas on April 24, 1995. Petitioners did not seek remand of this case.

Petitioners alleged violations of the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution, in addition to state law claims of assault and battery, intentional infliction of severe emotional distress, and other violations of the Texas Constitution. Specifically, Petitioners alleged that excessive force was used in their arrest on February 27, 1993. Petitioners also alleged that Interim Dallas Police Chief Robert Jackson, Deputy Chief Granver Tolliver, Captain Doug Kowalski and Sergeant Richard Garcia should be liable to them for breach of a duty to train, control, supervise and adequately dispatch the officers under their command. Cyr and Capper alleged that Jackson, Tolliver, Kowalski, Garcia, Parker and Maines were agents of the Dallas Police Department and the City of Dallas on February 27, 1993, and as a result of that agency, the Dallas Police Department and the City of Dallas should be liable to them. Petitioners further alleged that Garcia, Parker, Maines and Kowalski acted outside of their official capacities as police officers and should be individually liable to them for their actions.

Respondents asserted qualified immunity against Petitioners' state and federal claims, in their answers and in a motion for summary judgment, and the City also moved for summary judgment. By Memorandum Opinion and Order, dated July 8, 1996, and entered July 9, 1996, the district court granted Respondents' motion for

summary judgment in its entirety. Petitioners timely perfected an appeal, and the court of appeals affirmed the district court's grant of summary judgment.

B. Statement of Facts.

On February 27, 1993, at approximately 7:30 a.m., a group of abortion protestors entered the North Dallas Women's Clinic. Petitioners were among this group. Shortly thereafter, members of the Dallas Police Department's Tactical Division arrived on the scene under the supervision of Respondent Garcia. Upon their arrival, the Tactical Division found protestors in the parking lot, stairway and hallway leading to the clinic, as well as within the clinic itself. Many of the clinic patients had locked themselves in the interior rooms of the clinic in order to avoid confrontation with the protestors. Garcia and the clinic director proceeded to move throughout the clinic to ask the protestors to leave and issued the criminal trespass warning. At this time, Petitioner Capper was squatting down at the side of a couch confronting patients seated nearby regarding their unborn babies. After hearing the request to leave and the warning, Capper refused to move. Garcia told Respondent Parker and another officer to arrest Capper. Capper immediately fell to his stomach and was handcuffed with great difficulty. Parker then asked Capper to get up and walk. Capper refused to acknowledge Parker and would not move. Parker used a pressure point tactic on Capper in an effort to get Capper to walk out of the clinic under his own power. This tactic did not work. Parker, becoming increasingly concerned for the safety of the patients, Capper, and the other officers, warned Capper that he would

spray him with pepper mace if he did not walk. Capper remained unresponsive after this warning. Parker then sprayed Capper with pepper mace. Capper again refused to move and was finally carried out of the clinic by Parker and two other officers.

Meanwhile, Petitioner Cyr was also asked to leave and given a criminal trespass warning by Garcia and the clinic director as he was crouched on the floor yelling at a patient through the opening underneath a locked door. Cyr refused to leave. He remained crouched on the floor and was arrested and handcuffed with great difficulty by Respondent Maines and another officer. After handcuffing Cyr, Maines asked Cyr to come to his feet and walk. Cyr ignored the request and remained limp. Maines then applied pressure point tactics to Cyr in an effort to get him to stand up and walk. Cyr remained limp on the floor. Maines, feeling a sense of urgency to clear the area in front of the doorway so that medical attention could be given to the patient locked inside, warned Cyr that he would use pepper mace on him if he did not get up and walk. Again, Cyr did not respond and remained on the floor. Maines then sprayed Cyr with pepper mace. Cyr still refused to get up and walk. Cyr was then carried out by Maines and two other officers.

Respondent Jackson (who was Acting Chief of Police) was not involved in the incident on February 27, 1993. He did not participate in, nor did he direct the arrests of Petitioners. Jackson became aware of the incident when it was reported to him the night of February 27, 1993, or the next day, February 28, 1993. Additionally, Respondents Tolliver and Kowalski were not directly involved, nor did they personally participate in the arrests of Petitioners.

Due to the situation at the clinic, Tolliver and Kowalski deployed two Tactical Squads; however, they did not personally order the arrests of Petitioners, nor the accompanying use of force to overcome Petitioners' resistance. Kowalski became aware of the incident after it was reported to him by Garcia; Tolliver became aware of the incident after it was reported to him the night of February 27, 1993, or the next day, February 28, 1993. Petitioners both pleaded guilty to criminal trespass charges that were brought as a result of this incident.

The above facts are largely undisputed, as found by the district court and the court of appeals. Petitioners likewise concede that summary judgment was granted because the facts were undisputed. Petition for Writ of Certiorari, p. 15.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. The Standards For Review Have Not Been Met By Petitioners.

In vague and conclusory fashion, Petitioners assert that the Court's discretionary review powers are appropriately engaged by the Fifth Circuit's ruling vis-a-vis other courts' decisions, under Supreme Court Rule No. 10.1. Petition for Writ of Certiorari, pp. 3-4. Petitioners' contentions are without merit, and the Court should deny discretionary review in this matter.

Supreme Court Rule 10.1 states in relevant part:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a

> writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup.Ct.R.10.1(a) and (c). As the Court recently held, the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioners' failure to satisfy this standard should necessarily result in the Court's denial of their Petition.

In an attempt to establish that the Fifth Circuit's opinion conflicts with decisions of other circuit courts, Petitioners cite several decisions touching upon qualified immunity and excessive force for the proposition that "other circuit courts . . . employ a different standard and question whether or not 'qualified immunity' should be a defense at all." Petition for Writ of Certorari, p. 5. *None* of the cases cited by Petitioners, however, makes such a finding, assertion or comment. Indeed, in *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993), cited by Petitioners for that proposition, the court ruled that the opposite was true:

> We must determine whether the district court correctly found qualified immunity to be appropriate in this case.[2] . . .
>
> [2] The plaintiff argues that qualified immunity should never apply in excessive force cases, because of the inherent contradiction between excessive or unreasonable force and the reasonable use of such force. First, the plaintiff has waived this argument by failing to present it in the district court. *Cooper [v. Lane]*, 969 F.2d [368] at 371 [(7th Cir. 1992)]. Second, we disagree that qualified immunity has no place in an excessive force context. The doctrine is valuable in order to describe the unusual "burden" on the nonmoving party at the summary judgment stage. While ordinarily a court grants summary judgment only if no reasonable jury could find for the non-moving party, a court grants summary judgment based on qualified immunity if a reasonable officer could find the defendant's actions justified. When reasonable minds could differ, in the typical summary judgment decision the balance tips in favor of the nonmovant

> while in the qualified immunity context the balance favors the movant. *See Hunter v. Bryant*, ___ U.S. ___, ___, 112 S. Ct. 534, 537, 116 L.Ed.2d 589 (1991) ("[T]he court should ask whether the agents acted reasonably under the settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact."). Therefore, the doctrine of qualified immunity still serves an important purpose in cases of alleged excessive force.

Ellis v. Wynalda, 999 F.2d at 246 n.2. Likewise, the other cases cited by Petitioners stand not for the proposition that the qualified immunity defense is inappropriate for use in an excessive force case, but instead for the usual (and un-certiorari-worthy) proposition that a genuine issue of material fact about what actually occurred will defeat summary judgment. *See, e.g., McKinney By McKinney v. DeKalb County*, 997 F.2d 1440, 1443 (11th Cir. 1993) (disputed facts in a shooting incident); *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993) (genuine issue of material fact defeats summary judgment); and *Spann v. Rainey*, 987 F.2d 1110, 1114-1116 (5th Cir. 1993) (qualified immunity recognized under Graham is available in appropriate cases).

Petitioners' reference to cases inapposite to the issues presented herein do not warrant the Court's discretionary review in this case. All of the cases cited by Petitioners apply this Court's well-established precedents regarding qualified immunity. Petitioners' grounds for seeking certiorari are rooted not upon any actual conflict among the circuit courts of appeal regarding this Court's qualified immunity precedent, but instead upon Petitioners' mis-

reading of the lower courts' determination of that defense in a summary judgment context. Petitioners repeatedly ask this Court to review a specific finding by the court below, which finding was based upon established precedent in this Court and in the Fifth Circuit, arguing that a more reasonable interpretation of the events can be constructed. Petition for Writ of Certiorari, pp. 15-16. Petitioners' argument has already been addressed by this Court, and was rejected as an incorrect statement of applicable law. *Hunter v. Bryant*, 502 U.S. 224, 227-228 (1991).

The district court and the court of appeals determined that Respondents acted reasonably in the undisputed circumstances they faced, by properly relying upon well settled rules of law. Petitioners' argument would instead inject a subjective analysis into the qualified immunity equation, Petition for Writ of Certiorari, p. 7; no justifiable reason exists to turn back the clock in that regard. Petitioners' argument complains of the exercise of judgment by the officers in a unique situation, which is precisely what qualified immunity is designed to protect against. Petitioners' misapplication of properly stated rules of law does not warrant review of this case. Sup. Ct. R. 10.1.[1]

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[1] Curiously, Petitioners mention "a new concept of 'arguable probable cause' in Fourth Amendment qualified immunity analysis cases." Petition for Writ of Certiorari, pp. 5-6. No citations are provided to explain this "new concept;" such a concept is irrelevant, in any event, since there is no claim that the officers lacked probable cause to arrest Petitioners.

Most striking is Petitioners' omission of discussing the holding in a case factually similar to the instant case. In that case, the Ninth Circuit affirmed a jury's findings that police officers did not use excessive force and that police officers acted reasonably in using pain compliance techniques (which included nonchukas and direct physical contact causing extreme pain) when arresting anti-abortion demonstrators. *See Forrester v. City of San Diego,* 25 F.3d 804 (9th Cir. 1994), *cert. denied,* 513 U.S. ___, 115 S.Ct. 1104, 130 L.Ed.2d 1070 (1995). Petitioners do not address this case or its analogy in their Petition. Respondents contend that they did not, because they cannot distinguish it from the facts of this case. It indicates that the application of this Court's precedent is being applied at least uniformly by the circuits.

II. Summary Judgment: The Appropriate Legal Standard Regarding Respondents' Motion for Summary Judgment Required Dismissal.

Summary Judgment is appropriate in any kind of action

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). A motion for summary judgment is proper when the pleadings and record taken as a whole demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247

(1986). In appropriate circumstances, awarding summary judgment is not disfavored in federal court: "[s]ummary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

A party moving for summary judgment need not support his motion with affidavits or other evidence negating the non-movant's claims. Fed.R.Civ.P. 56. To withstand a motion for summary judgment, the non-movant must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); and *Topalian v. Ehrman*, 954 F.2d 1125, *reh'g denied*, 961 F.2d 215 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). The threshold inquiry, therefore, is whether there are "any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251. The substantive law identifies what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

Once the moving party establishes it is entitled to summary judgment, the burden shifts, and the non-moving party must "come forward with specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e)) (emphasis in original). In other words, summary judgment is mandatory when a party fails to establish the existence of an essential element of

his case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 322-324; *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). With the above summary judgment standards in mind, the district court analyzed Respondents' motion and Petitioners' evidence, and concluded that Petitioners' evidence was insufficient to establish a material factual dispute. Petitioners presented no new argument in their appeal below, nor do they here.

III. The Force Used Against Petitioners Did Not Rise to the Level of a Constitutional Violation.

Petitioners complain that the lower courts' judgment is erroneous because of the courts' refusal to treat Parker and Maines' subsequent departmental reprimands as conclusive, irrefutable evidence that Respondents acted unreasonably. Petition for Writ of Certiorari, p. 7. The district court addressed, discussed, and evaluated the evidence head-on, and found it legally insufficient to create liability:

> Plaintiffs argue that the subsequent reprimands of Parker and Maines are evidence that the Respondents acted unreasonably. However, the DPD may require a higher standard of conduct from its officials than that required by the United States Constitution. The reprimands state simply that Internal Affairs found the use of mace *unnecessary* given the hindsight of a thorough investigation. However, the U.S. Constitution does not require police officers to use the absolute least intrusive degree of force. Instead, it only requires the force to be reasonable to effect that particular arrest. *Graham*, 490

> U.S. at 396. That the DPD demands a higher standard of conduct from its officers than does the Constitution is admirable. Allowing a plaintiff to use the internal discipline administered by the DPD against them in a lawsuit would discourage such high standards of conduct. Thus, the fact that the officers were internally reprimanded certainly does not by itself create a conclusive presumption that they committed the constitutional tort of excessive force.

Petition for Writ of Certiorari, Appendix C-9, C-10. (emphasis in original). The court of appeals affirmed. *Id.*, Appendix B-5. Petitioners seek reversal of the lower courts' rulings because they disagree with the legal effect given to this evidence. Petitioners have presented no authority to support their novel proposition that the department's written reprimand is sufficient to create an issue of fact sufficient to warrant the case to proceed to a jury. The district court considered all evidence before it, and concluded that no factual dispute existed to defeat summary judgment as to Petitioners' excessive force claims. The lower courts' conclusions that Petitioners' claim of excessive force failed as a matter of law was not clearly erroneous under the applicable law. *See Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir. 1992), *cert. denied*, 507 U.S. ___, 113 S.Ct. 198, 122 L.Ed.2d 688 (1993); *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989).

Likewise, the facts as set forth by Petitioners do not establish that the use of force was objectively unreasonable under the circumstances. A police officer is justified under Texas law in using force, *inter alia*, when and to the degree he reasonably believes it is immediately necessary (1) to protect himself from serious bodily injury against

the use or attempted use of force against him; or (2) to overcome a person's resistance to arrest. *See* TEX. PENAL CODE §§ 9.31, 9.32, 9.33 and 9.51. Specifically, § 9.51 states:

> A police officer is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest . . . or to prevent or assist in preventing escape after arrest, if before using force the actor (1) manifests his purpose to arrest . . . and (2) identifies himself as a peace officer.

TEX. PENAL CODE § 9.51. In the present case, Respondents were wearing Dallas Police Department uniforms, which clearly identified them as police officers, and there is no contention that the officers lacked probable cause to arrest Petitioners. Petitioners produced no credible evidence which could dispute the officers' account of the incident with respect to the use of force. Thus, Petitioners failed to meet their burden of proof, and summary judgment was appropriate on behalf of Respondents with respect to this claim.

IV. Individual Respondents Are Shielded From Liability by the Qualified Immunity Doctrine.

Petitioners contend that the lower courts erred in granting the individual Respondents qualified immunity, thus dismissing their federal claims. Petitioners argument is not well-taken. A police officer is entitled to the defense of qualified immunity if he can establish that his conduct was lawful in light of clearly established law and the information he possessed. *Anderson v. Creighton,* 483

U.S. 635, 641 (1987). Thus, the ultimate question regarding the issue of qualified immunity in this case is whether a reasonable police officer could have believed that the force used by Parker and Maines was lawful in light of clearly established law and the information possessed by Parker and Maines at the time the decision was made to use force to overcome Petitioners' resistance to arrest. *See Anderson v. Creighton*, 483 U.S. at 641.

Petitioners state the standard in the reverse, asserting that since a reasonable person (in Petitioners' mind) would disagree with the conclusion reached, and action taken, by the officers, that submission to a jury is mandated. Petition for Writ of Certiorari, p. 16. Petitioners have misstated the law; if reasonable minds could differ as to the lawfulness of the officers' actions, then qualified immunity is mandated. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In other words, Petitioners' burden was to establish that no reasonable police officer would have taken the actions the officers took in this case. *Id.*; and *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989). Petitioners failed to produce such evidence.

Petitioners rely upon *Graham v. Connor*, 490 U.S. 386 (1989) as authority to establish the officers' unreasonableness. Petition for Writ of Certiorari, pp. 6-7, 11. Notwithstanding that reliance, this Court's standard of reasonableness is generous for the police in cases where potential danger, emergency conditions or other exigent circumstances are present. In *Graham*, the Court said that the "calculus of reasonableness" must make "allowance" for the need of police officers "to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is

necessary in a particular situation." *Graham v. Connor*, 490 U.S. at 396-97. *See also Anderson v. Creighton*, 483 U.S. at 638-639 ("reasonable officer" standard; immunity protects "all but the plainly incompetent or those who knowingly violate the law" or those who act where "the law clearly proscribed the actions" taken); and *Malley v. Briggs*, 475 U.S. at 343 (qualified immunity leaves "ample room for mistaken judgments"). Contrary to Petitioners' assertions, a jury does not automatically get to second-guess the officers' decisions at the scene. Petitioners contend that the situation could better have been handled differently, but provided no evidence, expert or otherwise, to support that claim.

Petitioners' reliance upon *Eugene v. Alief Independent School Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1995) is misplaced, to the extent Petitioners rely upon it regarding a finding of objective unreasonableness. Petition for Writ of Certiorari, pp. 15-16. In *Alief*, the facts were disputed, particularly as to the existence of probable cause to arrest; that issue (probable cause) is not present in this case, nor are the underlying facts in a similar state of contention. Based on the undisputed facts, the district court found Respondents' actions objectively reasonable. Accordingly, Respondents were entitled to qualified immunity, and all federal claims regarding excessive force were rightly dismissed against them.

The individual Respondents were also entitled to qualified immunity as a matter of pleading. Public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as from liability for

civil damages, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Scherer*, 468 U.S. 183 (1984), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Malley v. Briggs*, 475 U.S. 335 (1986); and *Pierson v. Ray*, 386 U.S. 547 (1967). Police officers are specifically entitled to assert this qualified immunity defense. *See Gassner v. City of Garland*, 864 F.2d 394 (5th Cir. 1989); *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982).

In *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court "clarif[ied] the analytical structure under which a claim of qualified immunity should be addressed." *Siegert v. Gilley*, 500 U.S. at 231. In rejecting the approach taken by the lower court, which had assumed without deciding that a constitutional claim had been stated, the Supreme Court held that the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff "allege[d] the violation of a clearly established constitutional right." *Id.* Prior to *Siegert*, the Fifth Circuit routinely addressed a defendant's entitlement to qualified immunity before reaching the merits of a plaintiff's constitutional claims. *See, e.g., Mouille v. City of Live Oak*, 977 F.2d 924 (5th Cir. 1992); and *Pfannsteil v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990). In light of *Siegert*, the Fifth Circuit mandates that trial courts should first determine whether a plaintiff has stated a claim for a violation of a constitutional right and then, and only then, address whether a plaintiff has pleaded facts that, if proved, would overcome a defendant's entitlement to qualified immunity. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276-78 (5th Cir. 1992). *See also Samaad v. City of Dallas*,

940 F.2d 925, 940 (5th Cir. 1991); and *Quives v. Campbell*, 934 F.2d 668, 670 (5th Cir. 1991). Petitioners unequivocally failed to meet the above standards and dismissal was appropriate.

V. Petitioners Were Not Injured as The Result of an Unlawful Policy, Practice or Custom of the City of Dallas.

1. The City of Dallas Has No Officially Adopted Policy Which is Unconstitutional.

Petitioners assert that the City failed to adequately train and supervise Respondents. Petition for Writ of Certiorari, pp. 16-18. Petitioners also contend that the City should be held liable to Petitioners based upon Respondents' actions and the status of Respondents as employees of the City of Dallas. *Id.* Petitioners' contentions are without merit, and summary judgment was appropriate on behalf of the City of Dallas (and the other Respondents sued in their official capacity which, under *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) is another way to sue the entity), because Petitioners did not meet their burden required to impose liability upon the City of Dallas.

A municipality can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 117 S.Ct. ___, 137 L.Ed.2d 626, 638-639 (1997); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). A city cannot be liable for

civil rights violations under a theory of respondeat superior or vicarious liability. *Id. See also Baskin v. Parker,* 602 F.2d 1205, 1208 (5th Cir. 1979).

Liability must rest on official policy, meaning the city government's policy, and not the policy of an individual official. *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984), *cert. denied,* 472 U.S. 1016 (1985). The official complained of must

> possess final authority to establish municipal policy with respect to the action ordered. . . . The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. . . . [W]hether an official had final policymaking authority is a question of state law.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481-482 (1986). An employee, agency or board of a city is not a policymaker unless the city, through its lawmakers, has delegated exclusive policymaking authority to that employee, agency or board and cannot review the action or decision of the employee, agency or board. *See St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Worsham v. City of Pasadena,* 881 F.2d 1336, 1340-41 (5th Cir. 1989).

Petitioners had the burden of establishing that they have been injured as a result of a policy of the City of Dallas. Petitioners did not establish that the Dallas City Council (the City's policymakers) or a policymaking official made a deliberate and conscious decision to ignore the rights of citizens with whom the police would come into contact or that any alleged policy actually caused the alleged injury to them. *City of Canton v. Harris,* 489 U.S.

378, 389 (1989). Accordingly, summary judgment was appropriate for the City of Dallas.

2. The City of Dallas Has No Persistent, Widespread Practice of City Officials or Employees Which Was So Widespread as to Constitute a Custom That Represented City Policy.

Petitioners contend that the City failed to adopt policies that instructed officers on the proper use of mace during arrests, that the supervisors failed to so train or supervise, and that the City was somehow negligent in those regards. Petition for Writ of Certiorari, pp. 16-18. Negligence cannot form the basis of liability in a § 1983 cause of action. *Daniels v. Williams,* 474 U.S. 327 (1986); and *Davidson v. Cannon,* 474 U.S. 344 (1986).

Petitioners, having failed to establish any evidence of an official policy adopted by the Dallas City Council (discussed in subsection 1, above), and unable to establish a claim for liability based on negligence, must therefore establish a persistent, widespread practice of City officials or employees which was so widespread as to constitute a custom that represented City policy. A single incident, without more, is not sufficient. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985). Petitioners only complain of their arrest, and provided no evidence of any other incident, to meet this requirement. As such, Petitioners' evidence, construed in the light most favorable to them, constitutes a complaint concerning an isolated incident occurring when pepper mace had just been provided to some officers for use in making arrests. Even

if it were determined to have been misconduct, it is undisputed that this was an isolated incident.

Finally, the facts and applicable law established, and the lower courts so held, that Respondents committed no constitutional violation. Petition for Writ of Certiorari, Appendix B-5, C-13, C-14. Accordingly, if there is no underlying constitutional wrong, a person has suffered no constitutional injury, and a city cannot be held liable based on a theory that its policy or custom caused a constitutional injury because the existence of the policy or custom is irrelevant. *Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). Therefore, the City of Dallas could not be liable to Petitioners under § 1983, and summary judgment was proper.

CONCLUSION

None of the issues Petitioners present is of such precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits or among the circuits and state courts of last resort regarding any of the issues presented. Further, this case does not present an issue of federal law that needs to be settled by this Court. The Fifth Circuit and the district court meticulously reviewed the facts and applied correct legal standards in reaching their conclusions. For the reasons stated herein, this Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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